United States Court of Appeals

for the Second Circuit

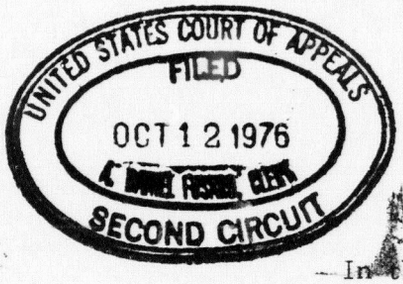
APPELLANT'S REPLY BRIEF

76-7318

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT



In the Matter of the Petition for
Arbitration between

FAIR WIND MARITIME CORPORATION, as
Owners of the S.S. "ISABENA",

Petitioner-Appellee,

and

TRANSWORLD MARITIME CORPORATION,
as Charterers,

Respondent-Appellant,

Under a Charter-Party dated June 14, 1972.

ON APPEAL FROM A FINAL ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT

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Docket No. 76-7318

REPLY BRIEF FOR APPELLANT

Introduction

Appellee makes much of the failure of Appellant's attorney to send to Appellee's counsel a copy of the letter addressed to the panel members, dated April 10, 1976 (58a), in which Appellant formally requested the members to disqualify themselves. This oversight was the result of a clerical error which occurred in Appellant's attorney's office. It has become Appellee's "red herring", being constantly raised by Appellee, but having nothing to do with the issues before the Court. The fact that the letter to the arbitrators was not received by Appellee on the same day it was delivered to the Arbitrators did not in any way prejudice Appellee or its counsel (74a).

POINT I

THE UNITED STATES DISTRICT COURTS POSSESS THE AUTHORITY TO ADJUDICATE THE ISSUE OF THE QUALIFICATION OF AN ARBITRATOR PRIOR TO ARBITRATION AND TO REMOVE AN ARBITRATOR WHOM IT FINDS DISQUALIFIED

Appellee alleges that the cases cited by Appellant in its brief in support of this assertion "differ vastly" from the facts before this Court. It apparently expects by simply so alleging to satisfy the Court that such is the case. Appellant submits the differences are not self-evident or obvious. On the contrary these cases speak directly to the issues presently before this Court.

Appellee, on page 6 of its brief, states that the dictum from San Carlo Opera Company v. Conley, 72 F. Supp. 825 833 (S.D.N.Y., 1946), aff'd 163 F. 2d 310 (2nd Cir., 1947), as quoted by Appellant in its brief, concerns situations in which the Court is asked before arbitration has commenced to change an arbitrator that it appointed. We agree. Appellant has previously asserted that all of these elements are present in this case. Yet, Appellee then proceeds with the argument that "the principle does not apply in the case at hand", because the charterer waited for more than two years after Professor Sweeney's appointment to raise an objection (Appellee's brief, page 6). The argument is not germain to the issue because, despite the fact that Appellee allowed more than a year and a half to pass before resuming initiative toward convening the

arbitration panel, Appellant asserted its objections at the first opportunity it had to do so.

Appellee, on page 10 of its brief, sets out a short synopsis of the facts of Julius Erving v. Virginia Squires Basketball Club, 349 F. Supp. 716 (E.D.N.Y., 1972), aff'd 468 F. 2d 1064 (2nd Cir., 1972), and would have this Court ignore the case because these facts do not directly parallel those found in the case at hand. The Erving case is cited by Appellant for the conceptual notion that the lower court possesses the equity power and authority to entertain the issue of the qualification of an arbitrator prior to arbitration, and not for its strict factual appositeness to the case before the Court. The propriety of citing the Erving case as precedent for this basic concept, ironically enough, is recognized by Appellee itself, in the quote to be found at the bottom of page 5 of its brief.

Appellant respectfully reiterates that the cases cited in its brief are proper and compelling precedent for its assertion that a district court may review the refusal of an allegedly partial or incompetent panel member to disqualify himself, and that it may do so prior to commencement of an arbitration.

POINT II

THE PROPER FORUM FOR CONSIDERATION AND ADJUDICATION OF THE SUBSTANTIVE MERITS OF APPELLANT'S CHALLENGES TO THE QUALIFICATIONS OF THE ARBITRATORS WHO COMPRISE THE PRESENTLY-CONSTITUTED PANEL IS THE UNITED STATES DISTRICT COURT

Under Point II of its brief Appellee undertakes to assert and argue its claim that "the panel is qualified and unbiased", thus addressing the precise substantive issue which Appellant seeks to have adjudicated by the lower court prior to proceeding before the arbitration panel. Judge Lawrence Pierce, in his decision below, expressly reserved opinion on this substantive issue in light of his finding that the District Court did not possess authority to hear the issue until an award had been rendered by the arbitration panel.

Appellant respectfully submits that, in view of its assertion that the lower court does possess jurisdiction to entertain the question of the qualifications of the arbitrators prior to arbitration, the proper forum for consideration of the substantive merits of the issue is the United States District Court, and that this Court of Appeals should remand the present case to that Court for adjudication in the first instance.

CONCLUSION

THE DECISION AND ORDER OF THE DISTRICT COURT COMPELLING APPELLANT TO PROCEED TO ARBITRATION BEFORE THE PRESENTLY-CONSTITUTED PANEL SHOULD BE REVERSED AND APPELLANT'S COUNTER-MOTION TO DISQUALIFY AND REMOVE THE PANEL GRANTED.

Dated: October 12, 1976
New York, New York

Respectfully submitted,

HARRINGTON HARLOW, ESQ.

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Received
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3:10 pm
10/12/76
DD